ceeded as far as this Board without that point apparently being taken, and their Lordships are unwilling in those circumstances to dimiss this appeal on a pleading point. It is however legitimate to note that the lack of cross-examination cannot in the circumstances be taken as tantamount to acceptance by the purchaser of the evidence. It is also to be observed that the evidence of all three was that if the vendor defaulted the vendor would have to pay $5,000 and return the deposit of $5,000: the evidence of the vendor and her brother was that if the purchaser defaulted the deposit would be forfeited, but the husband said that in those circumstances the deposit would be forfeited *and* the purchaser would have to pay damages.

One thing is plain: nobody gave evidence that there was an oral agreement that neither vendor nor purchaser would claim specific performance of the written agreement.

Section 11 (1) of the Specific Relief Act provides –

"Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the court, be enforced –

(c) When the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief."

Section 11 (2) provides –

"Unless and until the contrary is proved, the court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer movable property can be thus relieved."

Pausing there it is plain that the instant case is eminently one which required the exercise of the discretionary ability to order specific performance at the purchaser's suit: not only was there the requirement of a contract of sale of immovable property leading to a presumption by the court "unless and until the contrary is proved" that section 11(a)(c) was applicable: additionally there was no sustainable objection that at any stage the conduct of the purchaser was such as to disentitle her to equitable relief: and further the evidence was that the land in question was of particular importance to the purchaser for use in association with her neighbouring tin mining operations, in particular the deposit of tailings.

What is there to the contrary? The learned judge considered that a contemporaneous oral agreement served to prove that the vendor's breach of this contract to transfer immovable property could be adequately relieved by compensation in money, which displaced the presumption required of the court by section 11 (2), and made section 11 (1)(c) inapplicable. He held that section 92 proviso (b) of the Evidence Act applied to save the agreement's admissibility: a point which their Lordships do not find it necessary to approve or disapprove. The vendor's evidence on this oral agreement was, the judge said, corroborated by her husband: if that is limited to what was to happen on a vendor's default well and good: but it was not so in relation to a purchaser's default. The judge said further that it was substantiated by the evidence of Lam Wai Kee already quoted. Their Lordships can only agree with the Federal Court that it was not so substantiated. The judge went on to find that the oral agreement was that, in the event of default by the purchaser, the deposit would be forfeited plus damages: only the vendor's husband said that: and that in the event of default by the vendor she would have to refund the deposit and pay additionally $5,000.

Their Lordships are uncertain what ultimate conclusion the judge arrived at in deciding not to order specific performance. In the event he decided that the vendor must repay the deposit plus another $5,000: but since the deposit cheque had not been cashed that came to $5,000. He then proceeded to award a further $5,700 under the further or alternative claim for "Damages" – a total therefore of $10,700. It looks as though the judge was treating the $5,000 as something which the vendor had agreed (if she defaulted) to pay in consideration of the purchaser agreeing not to claim specific performance and to claim only damages. But no evidence came anywhere near that.

The real question however is whether the judge was right to refuse specific performance. If he thought that the fixing of the sum of $5,000 deprived him of jurisdiction to order specific performance he appears to have ignored section 19 of the Specific Relief Act, the terms of which are as follows:

"A contract, otherwise proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same."

If the judge considered he had jurisdiction to order specific performance but declined in the exercise of discretion to order it, he certainly in one respect took into consideration a wholly irrelevant matter – for in leading to a conclusion that "specific performance ought not to be granted" he started the sentence "Taking into consideration the alternative prayers of the plaintiffs in their pleadings ...". The commonplace fact of an alternative claim for damages in an action by a purchaser for specific performance of a contract for the sale of land cannot conceivably be a fact relevant to the exercise of the discretion. Accordingly the Federal Court was entitled to exercise its discretion and in their Lordships' opinion was correct in reversing the decision of the judge and ordering specific performance.

Accordingly the Appeal must be dismissed with costs, and their Lordships advise His Majesty the Yang di-Pertuan Agong accordingly.

Appeal dismissed.

Solicitors: *Coward Chance, Parker Garnett & Co.*

HARON BIN MOHD. ZAID v. CENTRAL SECURITIES (HOLDINGS) BERHAD

[P.C. (Lord Wilberforce, Lord Simon of Glaisdale, Lord Keith of Kinkel, Lord Bridge of Harwich and Sir William Douglas) April 26, 1982] [Privy Council Appeal No. 55 of 1980]

Practice and Procedure – Appeal – Summary Judgment – Leave to enter final judgment – Whether final or interlocutory – New and different grounds relied on in appeal to Federal Court – Important issues of fact in contention – Unconditional leave to appeal given – Rules of Supreme Court, 1957, Order 14, Order 54 rule 22A – Courts of Judicature Act, 1964.

In this case the respondents had agreed to sell to the appellants 1,400,000 fully paid up shares in a public company for the total

sum of $11,200,000. The purchase price was paid and the respondents delivered to the appellant share certificates for the shares including a certificate numbered 0227 for 523,278 shares, in relation to which the appellant received from the respondents a memorandum of transfer signed by a Dr. Chong. Subsequently the appellant sold to a company the Syarikat Seri Padu 560,000 of the shares which he acquired from the respondents. The appellant delivered the share certificates to Syarikat Seri Padu including the share certificate No. 0227 and the memorandum of transfer relating to it. The transfer of shares was registered by the company in favour of Syarikat Seri Padu. Later the secretary of the company wrote to Dr. Chong asking him to execute a fresh transfer form for the shares. Dr. Chong did not agree to do so as he said the shares were held in trust for International Holdings Ltd. The appellant commenced proceedings against the respondent claiming rescission of the agreement for the sale of the 1,400,000 shares. Subsequently the Syarikat Seri Padu commenced proceedings against the appellant claiming the sum of $4,186,224 for the purchase price of 523,278 shares not delivered. The appellant issued a third party notice against the respondents. The respondents took out a summons to set aside the third party notice. The appellant applied by summons for leave to enter judgment against the respondents, and Syarikat Seri Padu by summons applied for leave to enter final judgment against the appellants. All three summonses were heard by Harun J. in chambers whence they were adjourned by consent into court. The learned Judge dismissed the summons to set aside the third party notice. He gave leave to Syarikat Seri Padu to enter final judgment against the appellant and after argument gave leave to enter judgment against the respondents. The respondents applied in writing that the summonses be adjourned into open court for further argument but the learned Judge certified that he required no further argument. The respondents appealed to the Federal Court. The appellant applied by notice of motion for an order that the appeal be dismissed on the ground that no leave had been obtained from a judge of the High Court or the Federal Court. The motion was dismissed. The Federal Court heard the appeal and allowed the appeal *inter alia* giving the respondents unconditional leave to defend. (See [1979] 2 M.L.J. 244 & [1980] 1 M.L.J. 304). The appellant appealed.

Held: (1) it would be wrong to overrule the Federal Court on a matter of procedure as distinct from substantive law, unless it can be clearly shown that the court has misconstrued the statute law of Malaysia;

(2) the Federal Court in Malaysia has established a settled practice of applying Lord Alverstone's test in the *Bozson case* in order to determine whether an order is final or interlocutory. There is no error in this reasoning and the test is both sound and convenient;

(3) in any event this being a matter of practice and procedure, the Privy Council in accordance with practice, will uphold the decision of the Federal Court;

(4) in regard to the putting forward of new and different grounds in the Federal Court, this involved the discretion of the court and since it had not been shown that the court proceeded on some wrong principle the Privy Council would not intervene;

(5) the Federal Court had before it material which showed that a number of important issues of fact were in contention between the appellant and the respondents including the precise circumstances in which the appellant accepted the certificate No. 0227 and the memorandum of transfer signed by Dr. Chong. These matters require to be tried and in addition there was material showing that it may be impossible to restore the parties to their original positions some two and a half years having elapsed before the matter came before the courts during which time the appellant and his associates had control of the company and made substantial changes in the company's affairs. These considerations justified the conclusion reached by the Federal Court that the respondents should have unconditional leave to defend.

Cases referred to:–

(1) *Ratnam* v. *Cumarasamy* [1962] M.L.J. 330.
(2) *Salaman* v. *Warner & Others* [1891] 1 Q.B. 734, 736.
(3) *Bozson* v. *Altrincham Urban District Council* [1903] 1 K.B. 547.
(4) *Peninsular Land Development Sdn. Bhd.* v. *K. Ahmad* [1970] 1 M.L.J. 253.
(5) *Standard Discount Co.* v. *Otard de La Grange* (1877) 3 C.P.D. 67.
(6) *Becker* v. *City of Marion Corporation* [1977] A.C. 271, 282.
(7) *Tampion* v. *Anderson* (1974) 48 A.L.J.R. 11.
(8) *Smith* v. *Leech Brain & Co. Ltd.* [1962] 2 Q.B. 405, 415.
(9) *Boston* v. *Lelievre* (1870) L.R. 3 P.C. 157, 163.
(10) *Hong Kim Sui* v. *Malayan Banking Bhd.* [1971] 1 M.L.J. 289.
(11) *Arumugam Pillai* v. *Government of Malaysia* [1980] 2 M.L.J. 283.
(12) *Ng Cheng Yoon* v. *Mah binte Mat Isa* [1981] 1 M.L.J. 218.
(13) *Nagappa Rengasamy Pillai* v. *Lim Lee Chong* [1968] 2 M.L.J. 91.
(14) *Sri Jaya Transport Company Ltd.* v. *Fernández* [1970] 1 M.L.J. 87.
(15) *T.O. Thomas* v. *K.C.I. Reddy* [1974] 2 M.L.J. 87.
(16) *Malayan Banking Berhad* v. *Yap Seng Hock (unreported)*

PRIVY COUNCIL APPEAL FROM MALAYSIA.

Lord Rawlinson Q.C. (Keith Hornby, Nicholas Stewart and *K.S. Narayanan* with him) for the appellants.

Samuel Stamber Q.C. (Nicholas Bratza with him) for the respondents.

Cur. Adv. Vult.

Sir William Douglas (delivering the Judgment of the Board): This is an appeal by the appellant from two orders* made in the Federal Court of Malaysia (Suffian L.P., Raja Azlan Shah Ag. C.J. Malaya, Wan Suleiman F.J.):

(i) an order dated February 27, 1979 wherein the Federal Court dismissed the appellant's notice of motion dated October 13, 1978, in which the appellant had moved to dismiss the respondents' appeal from two orders of Harun J. both dated June 28, 1978 on the ground that the respondents had not obtained leave from a judge of the High Court or from the Federal Court in compliance with section 68(2) of the Courts of Judicature Act, 1964;

(ii) an order dated May 16, 1979, which

(a) allowed the respondents' appeal from the order of Harun J. dated June 28, 1978 giving the appellant judgment against the respondents in the sum of $4,186,224/– together with interest thereon and costs;

(b) gave directions in the third party proceedings brought by the appellant against the respondents;

(c) gave the respondents unconditional leave to defend in the said third party proceedings; and

(d) ordered the consolidation of the said third party proceedings with proceedings brought by the appellant against the respondents in the Kuala Lumpur High Court in Suit No. 2323 of 1976.

By an agreement in writing dated December 7, 1974 the respondents, a public limited company incorporated in Malaysia, agreed to sell to the appellant, a businessman and a company director, 1,400,000 fully paid up $1 shares in a public company known as United Holdings Berhad (hereinafter referred to as "U.H.") at $8 per share and at a total purchase price of $11,200,000. The purchase price was paid on or about January 22, 1975 and the respondents delivered to the appellant share certificates for the 1,400,000 shares in U.H. including a share certificate numbered 0227

* Second order by Tan Sri Chang Min Tat F. J.

for 523,278 shares, in relation to which the appellant received from the respondents a memorandum of transfer signed by a certain Dr. Chong Kim Choy.

On March 12 1975 the appellant sold on to a company called Syarikat Seri Padu Sdn. Bhd. (hereinafter referred to as "S.S.P.") 560,000 of the shares in U.H. which he had acquired from the respondents for the sum of $4,480,000. The appellant delivered the share certificates for these shares to S.S.P. and included among them the share certificate numbered 0227 and the memorandum of transfer relating to it. The transfer of shares was registered by U.H. in favour of S.S.P. but, that notwithstanding, on March 18, 1975 the Secretary of U.H. Mr. Yap Ping Kon, wrote to Dr. Chong Kim Choy in these terms:–

"I refer to the transfer form signed by you to cover certificate no. 0227 for 523,278 shares of United Holdings Bhd. and return herewith the said form for your cancellation.
As you are aware these shares were sold to Central Securities and subsequently to Mr. Koh Kim Chai. The transfer form executed by you is invalid as the transferee, International Holdings Pte. Ltd. has been inserted in the transfer form. As such I enclose herewith a new transfer form for your execution. Kindly sign on both sides of the transfer form marked by a pencil cross. On completion I shall be glad if you will return this to me immediately.
Your kind attention to this matter is greatly appreciated."

On April 22, 1975, Mr. Yap addressed another letter to Dr. Chong enclosing a copy of a transfer form for Dr. Chong's signature. Dr. Chong's reply is dated April 25, 1975, and is as follows:–

"I acknowledge with thanks your registered letter dated 22nd instant. This share certificate was held by us in trust for International Holdings (Pte.) Ltd., and I had already transferred the same shares back to them without any monetary consideration I am therefore returning the original transfer form signed by me (transferee being I.H.P.L.) to you. It is only proper that you transfer the shares to I.H.P.L. and get them to transfer the shares to whoever are the present legal owners. I regret that I cannot in good faith declare that I have received a sum of $1,486,109.52 from Sharikat Seri Padu Sdn. Bhd. when this is not true, as it will give rise to further problems for me."

On October 8, 1976, the appellant commenced proceedings in the High Court at Kuala Lumpur in Suit No. 2323 claiming against the respondents rescission of the agreement for the sale of 1,400,000 shares in U.H., the return of the purchase price and damages for fraudulent misrepresentation on the part of the respondents. The appellant pleaded, *inter alia,* that verbally and by letter of December 23, 1974, he had given the respondents notice of rescission of the agreement for the sale of the shares and had demanded the return of the purchase price. The respondents, in their defence, admitted the agreement to sell the shares but denied the representations alleged by the appellant. They stated that they had no knowledge of the letter dated December 23, 1974, giving notice of rescission and went on to plead that the agreement for the sale of the shares was affirmed by a supplemental agreement made between the parties on January 22, 1975. The respondents further pleaded that the appellant and his nominees had taken over control of U.H. and in consequence the appellant was not entitled to rescission.

According to the appellant's case it was only in December, 1976, that Mr. Koh Kim Chai, an associate of the appellant and a director of U.H., discovered that the memorandum of transfer in respect of the shares comprised in Certificate No. 0227 did not support the transfer of the shares to anybody other than International Holdings (Pte.) Ltd. However this may be, on a date prior to December 15, 1977, S.S.P. was de-registered in respect of the shares comprised in Certificate No. 0227 and Dr. Chong re-registered as the holder of those shares.

On May 21, 1977 S.S.P. commenced proceedings against the appellant claiming the sum of $4,186,224, the purchase price of 523,278 shares alleged not to have been delivered. On August 16, 1977, the appellant issued a third party notice against the respondents. The respondents entered a conditional appearance and on September 30, 1977 took out a summons to set aside the third party notice on the grounds, *inter alia:*

(a) that there was no proper question to be tried between the appellant and the respondents, and
(b) that the issue between the appellant and the respondents formed the subject of a separate action already pending before the court, namely Civil Suit No. 2323 of 1976.

On October 3, 1977, the appellant applied by summons for leave to enter final judgment against the respondents or alternatively for third party directions. On October 28, 1977 S.S.P. applied for leave to enter final judgment against the appellant.

All three of these applications came on for hearing on June 28, 1978 before Harun J. in chambers whence they were adjourned by consent into court. The learned Judge dismissed the summons to set aside the third party notice. He gave leave to S.S.P. to enter final judgment against the appellant and after argument gave the appellant leave to enter judgment against the respondents. Those judgments were entered in due course.

On June 29, 1978 the respondents applied in writing that the summonses be adjourned into open court for further argument in accordance with Order 54, rule 22A of the Rules of the Supreme Court. Harun J. certified that he required no further argument and the respondents appealed to the Federal Court.

Before the appeal came on for hearing before the Federal Court, the appellant applied by notice of motion for an order that the appeal be dismissed on the ground that no leave had been obtained from a judge of the High Court or from the Federal Court in accordance with the provisions of section 68(2) of the Courts of Judicature Act, 1964. That motion was dismissed on February 27, 1979.

On May 16, 1979 the Federal Court allowed the respondents' appeal and made orders in the terms set out above. Thereafter, on August 22, 1979 the appellant applied to the Federal Court for leave to appeal to His Majesty the Yang di-Pertuan Agong against the orders of the Federal Court but leave was refused. On May 8, 1980 the appellant, on petition to their Lordships, obtained special leave to appeal to His Majesty the Yang di-Pertuan Agong from the orders of the Federal Court dated February 27 and May 16, 1979.

The first issue which arises in this appeal is whether the orders made in these proceedings by Harun J. are final

or interlocutory. It is contended on behalf of the appellant that they are interlocutory and thus fall within the scope of section 68(2) of the Courts of Judicature Act, 1964, which provides –

"No appeal shall lie from an interlocutory order made by a Judge of the High Court in Chambers unless the Judge has certified, after application, within four days after the making of the order by any party for further argument in court, that he requires no further argument, or unless leave is obtained from the Federal Court or from a Judge of the High Court."

It is further argued that, as the orders were made in open court and not in chambers, the question of obtaining a certificate that no further argument was required did not arise, and, as no leave had been obtained, the appeal was not properly before the Federal Court.

The Malaysian courts have considered the question of whether orders are final or interlocutory in a number of cases extending over a period of twenty years and commencing with *Ratnam* v. *Cumarasamy*.[1] In that case the Malayan Court of Appeal examined several English cases including *Salaman* v. *Warner & Ors.*[2] where Fry L.J. formulated the test in these terms:–

"I think that the true definition is this. I conceive that an order is 'final' only where it is made upon an application or other proceeding which must, whether such application or other proceeding fail or succeed, determine the action. Conversely I think that an order is 'interlocutory' where it cannot be affirmed that in either event the action will be determined."

The court compared this with the test advanced by Lord Alverstone C.J. in *Bozson* v. *Altrincham Urban District Council*[3] namely:–

"Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order."

The Malayan Court of Appeal unanimously adopted the test in the *Bozson* case in preference to that in the *Salaman* case. In delivering the judgment of the court, Good J.A. stated:–

"In the present case our order refusing an extension of time for the applicant to file the record of appeal put an end to the proceedings and applying Lord Alverstone's test finally disposed of the rights of the parties by barring the unsuccessful plaintiff from appealing against the order of the High Court. Our order ... is therefore for the purposes of appeal a final order..."

In his short concurring judgment Hill Ag. C.J. observed:–

"Out of a number of conflicting opinions and decisions that of Lord Alverstone in *Bozson's* case stands out as the one judgment that provides a real and practical test for determining whether an order is final or interlocutory and I too would apply it here."

Ratnam v. *Cumarasamy* was followed by the Federal Court in *Peninsular Land Development Sdn. Bhd.* v. *K. Ahmad.*[4] Again there was a careful review of the leading English cases on the subject starting with *Standard Discount Co.* v. *Otard de la Grange*[5] where it was held that an order empowering a plaintiff to sign judgment upon a specially indorsed writ is interlocutory. Again the court decided that the appropriate test for determining whether an order is final or interlocutory is that stated by Lord Alverstone in the *Bozson* case. And thus the Malaysian courts treat an order of court giving leave to a plaintiff to sign final judgment as a final order, thus entitling a defendant to appeal to the Federal Court without the necessity of obtaining leave.

It must be recalled that in England and Wales section 68(2) of the Supreme Court of Judicature (Consolidation) Act 1925 (now repealed and substantially re-enacted by section 60(2) of the Supreme Court Act 1981), provided that:–

"Any doubt which may arise as to what orders or judgments are final, and what are interlocutory, shall be determined by the Court of Appeal."

Thus, the Court of Appeal's decision whether the order is final or not is not subject to appeal and as Lord Edmund-Davies pointed out in *Becker* v. *City of Marion Corporation*[6] some of its decisions on the point are difficult to reconcile.

In *Tampion* v. *Anderson*[7] the question before the Board on a petition for special leave to appeal against an order made in the Supreme Court of Victoria staying an action on the ground that it was frivolous, vexatious and an abuse of the process of the court was whether that order was final or interlocutory. It appears from the judgment of Lord Kilbrandon that the Australian courts accept as authoritative the English decisions on this topic. Lord Kilbrandon continued at page 12 –

"It was submitted, and their Lordships would be inclined to agree, that the authorities are not in an altogether satisfactory state. There is a continuing controversy whether the broad test of finality in a judgment depends on the effect of the order made, as decided in *Bozson* v. *Altrincham U.D.C.* per Lord Alverstone C.J. at page 548, or on the application being of such a character that whatever order had been made thereon must finally have disposed of the matter in dispute – *Salaman* v. *Warner*. But the difficulty seems to arise out of attempts to frame a definition of 'final' (or of 'interlocutory') which will enable a judgment to be recognized for what it is by appealing to some formula universally applicable in any contingency in which the classification falls to be made."

Their Lordships are mindful of the great reliance placed by the Federal Court on English precedents and of the observation made by Lord Parker C.J. in *Smith* v. *Leech Brain & Co. Ltd.*[8] that "it is important that the common law, and the development of the common law, should be homogeneous in the various sections of the Commonwealth". But it must be remembered that in England the practice with respect to appeals from orders in summary proceedings refusing the defendant unconditional leave to defend an action has since 1925 been governed by statute. The Supreme Court of Judicature (Consolidation) Act, 1925 provided in section 31(2) (now repealed and substantially re-enacted in section 18(2)(a) of the Supreme Court Act 1981) –

"An Order refusing unconditional leave to defend an action shall not be deemed to be an interlocutory order within the meaning of this section".

The effect of this is to give a defendant an appeal as of right against an order giving leave to a plaintiff to sign final judgment against him in summary proceedings. Moreover it would seem to their Lordships that it would be wrong to overrule the Federal Court on a matter of procedure as distinct from substantive law, unless it can be clearly shown that the court has misconstrued the statute law of Malaysia. As Lord Westbury observed in *Boston* v.

Lelievre[9]:–

"Their Lordships would hesitate very much to interfere with the unanimous judgment of the court below upon a matter of this kind, which is to be regarded as a matter of procedure only, unless they were clearly satisfied that the court had made a great mistake in the construction put upon these Statutes."

It appears to their Lordships that the Federal Court in *Ratnam* v. *Cumarasamy* and *Peninsular Land Development Sdn. Bhd.* v. *K. Ahmad (supra)* and subsequently in *Hong Kim Sui* v. *Malayan Banking Bhd.*,[10] *Arumugam Pillai* v. *Government of Malaysia*[11] and *Ng Cheng Yoon* v. *Mah Binti Mat Isa*[12], all of which are unanimous, reserved judgments, has established over the years a settled practice of applying Lord Alverstone's test in the *Bozson* case in order to determine whether an order is final or interlocutory. Their Lordships are unable to find any error in this reasoning: on the contrary their Lordships feel entitled to say that the test is both sound and convenient. In three of the five cases cited above the appeal was against leave to sign judgment in summary proceedings. Thus the effect of the practice adopted by the Federal Court in such cases is in line with the English practice as established by Statute since 1925. In any event, this being a matter of practice and procedure, their Lordships, in accordance with their practice, will uphold the decision of the Federal Court.

Lord Rawlinson for the appellant drew attention to the cases of *Nagappa Rengasamy Pillai* v. *Lim Lee Chong*[13], *Sri Jaya Transport Company Ltd.* v. *Fernandez*[14] and *T.O. Thomas* v. *K.C. I. Reddy*[15] as well as the unreported case of *Malayan Banking Berhad* v. *Yap Seng Hock*[16] (1980) and invited the Board to express a view on what were said to be inconsistencies in the application of Order 54, Rules 22 and 22A of the Rules of the Supreme Court of Malaysia. Their Lordships consider that they must decline from so doing firstly because any views they express would be purely *obiter* in the light of the conclusion they have reached on the main issue in this appeal, and secondly because the points raised are purely procedural and ought to be resolved by the Federal Court.

The second main issue in this appeal is whether the Federal Court was wrong in granting to the respondents unconditional leave to defend the claim brought by the appellant against them. It is also contended that the respondents were allowed on appeal to the Federal Court to put forward new and different grounds from that relied on by them before Harun J. As to the putting forward of new and different grounds, this involves the discretion of the court and since it has not been shown that the court proceeded on some wrong principle the Board will not intervene. As to the granting of unconditional leave the Federal Court had before it material which, among other things, showed that a number of important issues of fact are in contention between the appellant and the respondents including the precise circumstances in which the appellant accepted Certificate No. 0227 and the memorandum of transfer signed by Dr. Chong. It would be inappropriate for their Lordships to say more, at this stage, than that these issues require to be tried. There was in addition material showing that it may be impossible to restore the parties to their original positions, some two-and-a-half years having elapsed before the matter came before the courts during which time the appellant and his associates had control of U.H. and made substantial changes in the company's affairs. These considerations commend themselves to their Lordships as justifying the conclusion reached by the Federal Court that the respondents should have unconditional leave to defend.

Their Lordships will advise His Majesty the Yang di-Pertuan Agong that the appeal should be dismissed, with costs.

Appeal dismissed

Solicitors: *Kingsford Dorman, Mcfarlanes.*

GARDEN CITY DEVELOPMENT BERHAD v. COLLECTOR OF LAND REVENUE, FEDERAL TERRITORY

[P.C. (Lord Keith of Kinkel, Lord Roskill, Lord Brandon of Oakbrook, Lord Brightman and Sir Sebag Shaw) May 26, 1982]
[Privy Council Appeal No. 6 of 1980]

Land Law – Classification of land – Land alienated before the coming into force of National Land Code – Town Land held under Registry Title – Land to be used neither for agricultural nor industrial purposes – Whether there was need to apply for imposition of category of use of land to be used for building – Time for appeal – National Land Code, ss. 53, 110, 116, 127, 128 & 418.

The appellants are proprietors of a site in the city of Kuala Lumpur upon which they have erected a substantial shopping-cum-office complex, known as Wisma Central. They applied for subdivision of the land to enable part of it to be given for road-widening. In reply the Collector of Land Revenue stated that the appellants should first apply for conversion under section 124 of the National Land Code. The appellants thereupon applied for conversion of the land. Subsequently they were informed by the Director of Lands and Mines, Federal Territory, that the Land Executive Committee had decided that their application would only be approved if (a) the appellants made certain payments for premium and tax on the change of the category of use of the land to building and (b) they accepted a 99 year lease in exchange for their title. The appellants did not surrender the title or pay the premium. The Collector of Land Revenue then served a notice on the appellants under section 128 of the National Land Code to remedy their failure to alter the condition of the land use from "agriculture to commercial". The appellants applied for an order that the Collector of Land Revenue cancel the notice on the ground that the notice was bad and invalid. It was argued that as there was no expressed endorsement on the document of title pertaining to the category of land use there was no necessity for them to apply for conversion. Harun J. allowed the application in the High Court but on appeal the Federal Court held (a) the land in question was town land held under registry title and on the coming into force of the National Land Code came under the provisions of section 53(3) of the Code which provides that it shall be used neither for agricultural nor for industrial purposes; (b) in order to use the land for building, the owners have to apply for the imposition of the category of building under section 124 of the National Land Code; and (c) in this case the appellants have failed in erecting the building to apply for the imposition of the category "building" to their title and this failure constituted a breach of the condition by reason of which action under section 128 of the National Land Code could be and was taken – See [1979] 1 M.L.J. 223. The appellants appealed.

Held, allowing the appeal: (1) the stamping of the words "Lease for agricultural land" on the original lease could not in itself have the effect of imposing a condition for use for agriculture only and in the circumstances it was not possible to infer from the lease an intention to restrict the use of the land to agriculture;